

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

QUINTIN R. CROSS,

Plaintiff,

v.

BRAZIL, et al.,

Defendants.

No. 2:21-cv-00766-CKD P

ORDER

Plaintiff is a state prisoner proceeding pro se. Plaintiff seeks relief pursuant to 42 U.S.C. § 1983 and has paid the appropriate filing fee. This proceeding was referred to this court by Local Rule 302 pursuant to 28 U.S.C. § 636(b)(1).

**I. Screening Standard**

The court is required to screen complaints brought by prisoners seeking relief against a governmental entity or officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). The court must dismiss a complaint or portion thereof if the prisoner has raised claims that are legally “frivolous or malicious,” that fail to state a claim upon which relief may be granted, or that seek monetary relief from a defendant who is immune from such relief. 28 U.S.C. § 1915A(b)(1),(2).

A claim is legally frivolous when it lacks an arguable basis either in law or in fact. Neitzke v. Williams, 490 U.S. 319, 325 (1989); Franklin v. Murphy, 745 F.2d 1221, 1227-28 (9th Cir. 1984). The court may, therefore, dismiss a claim as frivolous where it is based on an

1 indisputably meritless legal theory or where the factual contentions are clearly baseless. Neitzke,  
 2 490 U.S. at 327. The critical inquiry is whether a constitutional claim, however inartfully  
 3 pleaded, has an arguable legal and factual basis. See Jackson v. Arizona, 885 F.2d 639, 640 (9th  
 4 Cir. 1989); Franklin, 745 F.2d at 1227.

5 In order to avoid dismissal for failure to state a claim a complaint must contain more than  
 6 “naked assertions,” “labels and conclusions” or “a formulaic recitation of the elements of a cause  
 7 of action.” Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555-557 (2007). In other words,  
 8 “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory  
 9 statements do not suffice.” Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). Furthermore, a claim  
 10 upon which the court can grant relief has facial plausibility. Twombly, 550 U.S. at 570. “A  
 11 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
 12 the reasonable inference that the defendant is liable for the misconduct alleged.” Iqbal, 556 U.S.  
 13 at 678. When considering whether a complaint states a claim upon which relief can be granted,  
 14 the court must accept the allegations as true, Erickson v. Pardus, 127 S. Ct. 2197, 2200 (2007),  
 15 and construe the complaint in the light most favorable to the plaintiff, see Scheuer v. Rhodes, 416  
 16 U.S. 232, 236 (1974).

## 17 **II. Allegations in the Complaint**

18 At all times relevant to the allegations in the complaint, plaintiff was an inmate with  
 19 muscular dystrophy at Mule Creek State Prison. On July 16, 2020, plaintiff entered the program  
 20 office to speak with defendant Feryance about an urgent matter. Defendants Aralado and  
 21 Fonsworth ordered plaintiff out of the program office and to return to his cell. On the way to his  
 22 cell, plaintiff was forcefully handcuffed behind his back by defendant Brazil which was in  
 23 disregard of a medical chrono to allow him to be handcuffed in front. Plaintiff alleges that  
 24 defendant Brazil jerked his arms “in a manner that was obviously meant to cause pain.” ECF No.  
 25 1 at 5. This use of force caused plaintiff to suffer pain in his right shoulder that requires ongoing  
 26 medical treatment. The complaint also alleges that defendants Brazil, Tsushoko, and Clays  
 27 cancelled numerous cell moves to Housing Unit #1 for plaintiff because he files inmate appeals.  
 28 By way of relief, plaintiff seeks compensatory and punitive damages as well as declaratory relief.

### III. Legal Standards

The following legal standards are being provided to plaintiff based on his pro se status as well as the nature of the allegations in his complaint.

#### A. Linkage

The civil rights statute requires that there be an actual connection or link between the actions of the defendants and the deprivation alleged to have been suffered by plaintiff. See Monell v. Department of Social Services, 436 U.S. 658 (1978); Rizzo v. Goode, 423 U.S. 362 (1976). The Ninth Circuit has held that “[a] person ‘subjects’ another to the deprivation of a constitutional right, within the meaning of section 1983, if he does an affirmative act, participates in another’s affirmative acts or omits to perform an act which he is legally required to do that causes the deprivation of which complaint is made.” Johnson v. Duffy, 588 F.2d 740, 743 (9th Cir. 1978) (citation omitted). In order to state a claim for relief under section 1983, plaintiff must link each named defendant with some affirmative act or omission that demonstrates a violation of plaintiff’s federal rights.

#### B. Retaliation

“Within the prison context, a viable claim of First Amendment retaliation entails five basic elements: (1) An assertion that a state actor took some adverse action against an inmate (2) because of (3) that prisoner’s protected conduct, and that such action (4) chilled the inmate’s exercise of his First Amendment rights, and (5) the action did not reasonably advance a legitimate correctional goal. Rhodes v. Robinson, 408 F.3d 559 567-68 (9th Cir. 2005) (citations omitted). Filing an inmate grievance is a protected action under the First Amendment. Bruce v. Ylst, 351 F.3d 1283, 1288 (9th Cir. 2003). A prison transfer may also constitute an adverse action. See Rhodes v. Robinson, 408 F.3d 559, 568 (9th Cir. 2005) (recognizing an arbitrary confiscation and destruction of property, initiation of a prison transfer, and assault as retaliation for filing inmate grievances); Pratt v. Rowland, 65 F.3d 802, 806 (9th Cir. 1995) (finding that a retaliatory prison transfer and double-cell status can constitute a cause of action for retaliation under the First Amendment).

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### 1           **C. Excessive Force**

2           The Eighth Amendment prohibits prison officials from inflicting cruel and unusual  
 3 punishment on inmates which has been defined as “the unnecessary and wanton infliction of  
 4 pain.” Whitley v. Albers, 475 U.S. 312, 319 (1986). “[W]henever prison officials stand accused  
 5 of using excessive physical force in violation of the Cruel and Unusual Punishments Clause, the  
 6 core judicial inquiry is... whether force was applied in a good-faith effort to maintain or restore  
 7 discipline, or maliciously and sadistically to cause harm.” Hudson v. McMillan, 503 U.S. 1, 7  
 8 (1992). The court’s inquiry into an excessive force claim focuses on the extent of the prisoner’s  
 9 injury, the need for application of force, the relationship between that need and the amount of  
 10 force used, the threat reasonably perceived by the responsible officials, and any efforts made to  
 11 temper the severity of a forceful response. Hudson, 503 U.S. at 7 (1992) (quotation marks and  
 12 citations omitted). While the absence of a serious injury is relevant to the Eighth Amendment  
 13 inquiry, it does not end it. Hudson, 503 U.S. at 7. The malicious and sadistic use of force to  
 14 cause harm always violates contemporary standards of decency in violation of the Eighth  
 15 Amendment. Whitley, 475 U.S. at 327.

### 16           **IV. Analysis**

17           After conducting the required screening, the court finds that plaintiff may proceed on the  
 18 Eighth Amendment excessive force claim against defendant Brazil and the First Amendment  
 19 retaliation claims against defendants Brazil, Tsushoko, and Clays. However, plaintiff has failed  
 20 to state a claim against defendants Aralado, Fonsworth, and Feryance because there are no  
 21 allegations linking them to the use of excessive force or retaliation. Plaintiff may elect to amend  
 22 his complaint to attempt to cure the deficiencies with respect to these defendants. See Lopez v.  
 23 Smith, 203 F.3d 1122, 1126–27 (9th Cir. 2000) (en banc) (district courts must afford pro se  
 24 litigants an opportunity to amend to correct any deficiency in their complaints). If plaintiff  
 25 chooses to proceed on the First and Eighth Amendment claims against defendants Brazil,  
 26 Tsushoko, and Clays found cognizable in this screening order, the court will construe this as a  
 27 request to voluntarily dismiss the additional claims pursuant to Rule 41(a)(1)(i) of the Federal  
 28 Rules of Civil Procedure.

1 If plaintiff chooses to amend the complaint, plaintiff must demonstrate how the conditions  
2 complained of have resulted in a deprivation of plaintiff's constitutional rights. See Ellis v.  
3 Cassidy, 625 F.2d 227 (9th Cir. 1980). Also, in his amended complaint, plaintiff must allege in  
4 specific terms how each named defendant is involved. There can be no liability under 42 U.S.C.  
5 § 1983 unless there is some affirmative link or connection between a defendant's actions and the  
6 claimed deprivation. Rizzo v. Goode, 423 U.S. 362 (1976). Furthermore, vague and conclusory  
7 allegations of official participation in civil rights violations are not sufficient. Ivey v. Board of  
8 Regents, 673 F.2d 266, 268 (9th Cir. 1982).

9 Finally, plaintiff is informed that the court cannot refer to a prior pleading in order to  
10 make plaintiff's amended complaint complete. Local Rule 220 requires that an amended  
11 complaint be complete in itself without reference to any prior pleading. This is because, as a  
12 general rule, an amended complaint supersedes the original complaint. See Loux v. Rhay, 375  
13 F.2d 55, 57 (9th Cir. 1967). Once plaintiff files an amended complaint, the original pleading no  
14 longer serves any function in the case. Therefore, in an amended complaint, as in an original  
15 complaint, each claim and the involvement of each defendant must be sufficiently alleged.

#### 16 **V. Plain Language Summary for Pro Se Party**

17 The following information is meant to explain this order in plain English and is not  
18 intended as legal advice.

19 Some of the allegations in the complaint state claims for relief against the defendants, and  
20 some do not. You must decide if you want to (1) proceed immediately on the Eighth Amendment  
21 excessive force claim against defendant Brazil and the First Amendment claims against  
22 defendants Brazil, Tsushoko, and Clays; or, (2) amend the complaint to fix the problems  
23 identified in this order with respect to the remaining claims. **Once you decide, you must**  
24 **complete the attached Notice of Election form by checking only one box and returning it to**  
25 **the court.**

26 Once the court receives the Notice of Election, it will issue an order telling you what you  
27 need to do next. If you do not return this Notice, the court will order service of the complaint  
28 only on the claims found cognizable in this screening order and will recommend dismissing the

remaining claims.

Accordingly, IT IS HEREBY ORDERED that:

1. Plaintiff has the option to proceed immediately on the Eighth Amendment excessive force claim against defendant Brazil and the First Amendment retaliation claims against defendants Brazil, Tsushoko, and Clays. In the alternative, plaintiff may choose to amend the complaint to fix the deficiencies identified in this order with respect to the remaining claims.
2. Within 21 days from the date of this order, plaintiff shall complete and return the attached Notice of Election form notifying the court whether he wants to proceed on the screened complaint or whether he wants time to file an amended complaint.
3. If plaintiff fails to return the attached Notice of Election within the time provided, the court will construe this failure as consent to dismiss the deficient claims and proceed only on the cognizable claims identified above.

Dated: August 3, 2021



CAROLYN K. DELANEY  
UNITED STATES MAGISTRATE JUDGE

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NOTICE OF ELECTION

**Check only one option:**

\_\_\_\_\_ Plaintiff wants to proceed immediately on the Eighth Amendment excessive force claim against defendant Brazil and the First Amendment retaliation claims against defendants Brazil, Tsushoko, and Clays. Plaintiff voluntarily dismisses the remaining defendants; **or**

\_\_\_\_\_ Plaintiff wants time to file a first amended complaint.

DATED:

\_\_\_\_\_  
Plaintiff